

September 13, 2004

Via Electronic Filing

Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

Time Warner Inc. thanks the Federal Trade Commission (“FTC” or “Commission”) for the opportunity to submit these comments in response to its Notice of Proposed Rulemaking (“NPRM”) on the regulations to be enacted under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, Pub. L. No. 108-187 (“CAN-SPAM” or the “Act”), 16 C.F.R. Part 316, 69 Fed. Reg. 50091, August 13, 2004. The Commission’s NPRM raises important questions with respect to the proper interpretation and application of the Act’s requirements as they relate to determining the criteria that could be used to determine whether the “primary purpose” of an electronic mail message is commercial and, therefore, whether a particular message constitutes a “commercial electronic mail message” subject to the CAN-SPAM Act’s requirements and prohibitions.

Time Warner also submitted comments on the Commission’s Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 11776, March 11, 2004. As we stated in those comments, Time Warner’s divisions, including America Online (AOL), Home Box Office (HBO), Time Inc., Time Warner Cable, Turner Broadcasting System, and Warner Bros. Entertainment, are committed to reducing spam and providing consumers with choice and control over the types of commercial e-mail messages they receive.

As we stated in our prior comments, we believe the primary purpose of a commercial electronic mail message should be determined based on an evaluation of objective circumstances, affording clear guidance that enables companies to ascertain their obligations under the Act. We believe that the statute requires a “purpose” test rather than the “effects” test that the Commission proposes based on the impression of the reasonable recipient. The Commission, in issuing the final rule, should try to implement objective standards that easily can be adopted by senders and understood by recipients.

Critical to an evaluation of the proposed criteria and their effectiveness is further interpretive guidance on the parameters of content that falls within the “commercial” or “transactional or relationship” categories. The Commission focuses much of its proposal on how to classify dual-purpose messages once a sender has identified whether the content is commercial or transactional; but further guidance is necessary in order to first identify the content itself. Moreover, the Commission should clarify that certain messages, despite the presence of advertisements or promotional material, do not have a primary purpose that is commercial, by default. Finally, we believe that the NPRM does not adequately address circumstances in which there are multiple senders, and how the primary purpose criteria would be applied in those contexts. With these types of clarifications and refinement, we believe that the Commission’s proposal will provide meaningful guidance to companies with respect to the requirements under CAN-SPAM.

Further Clarification of the Definitions of “Commercial” and “Transactional or Relationship” Categories is Needed and Additional Consideration For Overlap in Primary Purpose Categories are Needed

The Commission sets forth three different standards for determining the primary purpose of a message, depending on the content of the message: a standard for messages that contain only commercial content; one for messages that contain both commercial content and transactional/relationship content; and one for messages that contain both commercial content and content that is neither transactional or relationship in nature.

It is difficult to fully evaluate the proposed criteria without knowing the parameters of the content that is classified within the definitions of “commercial” or “transactional or relationship” content. The NPRM does not offer much guidance with respect to what types of content would fall within these two classifications. Time Warner believes that such issues should be addressed in the context of this primary purpose rulemaking. The Commission should provide examples of the types of content that fall within these categories so that companies can better ascertain their obligations in connection with e-mail marketing.

One example of where a company cannot determine how a message is to be categorized is where a consumer affirmatively requests to receive certain electronic content, *e.g.*, electronic delivery of *Time* magazine pursuant to a subscription. Arguably, an electronic publication (*e.g.*, electronic copy of *Time* magazine) could fall within both categories two and three for determining a message’s primary purpose, as set forth in the proposed rule. This type of publication could satisfy the definition of transactional or relationship and fall into category two because it may constitute “deliver[y of] goods or services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.” 15 U.S.C. § 7702(17)(A)(v). Such a publication also could fall within category three as it could constitute editorial content that is not related to a transaction or relationship. The primary test to apply would differ depending on how the message’s content is classified.

Treatment of Newsletters and E-mail Alerts

Clarification of the content definitions would make compliance with the rule much more feasible but, in any event, we believe that certain messages that have been affirmatively requested by the consumer should not be deemed to have a commercial primary purpose. For example, e-mail alerts and newsletters that the recipient has affirmatively requested to receive should fall outside of the commercial electronic mail message definition, and should not be subject to evaluation under any of the proposed criteria.

Congress deemed such messages to have a primary purposes that is transactional or relationship in nature. Despite the presence of any advertisements, which reasonable consumers would expect, these messages should not be subject to the criteria for dual-purpose messages set forth in category two. Moreover, where an individual requests a subscription to a newsletter, senders should not have to scrub their lists against opt-outs provided to other advertisers or entities whose content is included within a message.

This approach is consistent with consumer expectations and ensures that the electronic medium will be a viable place for electronic transactions, facilitating the continued expansion and growth of electronic commerce. Moreover, this approach is consistent with the statutory requirements in focusing on the primary purpose of the message, rather than on the effects of the message on the recipient.

Impact of the Proposed Criteria on Multiple Senders

The issue of multiple senders raised in the ANPRM is inextricably intertwined with the broader CAN-SPAM requirements and affects any evaluation of this proposed three-category criteria for determining a message's primary purpose. Thus, we want to emphasize that it is critical for the Commission to address the issue of multiple senders in its proceedings.

If the Commission does not address the issue of multiple senders, each entity involved with a mailing might be deemed a "sender" and, under the proposed criteria, arguably could be required to play a role in the placement of content within a message, including evaluation of the subject line. This would result in a tremendous burden on companies that are not in a position to control the content or layout of a message, and would not account for the realities of e-mail marketing, foreclosing legitimate joint marketing activities that may benefit consumers.

The issue of multiple senders is exacerbated in the context of electronic publications that contain content from multiple advertisers. If such communications are deemed to have a primary purpose that is commercial, each advertiser in the magazine or e-mail newsletter potentially could be required to provide an opt out if the "sender" is not properly defined. This result would be counterintuitive, contrary to consumer expectations, and would greatly complicate compliance obligations, and would chill legitimate business practices in this industry.

As we stated in our comments on the ANPRM, the company that originates the message is usually the one that owns and manages the list of recipients and, therefore, is in the best position to ensure that opt-out requests are fully honored.

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Time Warner appreciates the opportunity to provide the Commission with comments on the NPRM. We thank the Commission for considering our views, and look forward to working with you to address these important issues.

Sincerely,

Jennifer Jacobsen
Vice President, Global Public Policy

Time Warner Inc.
800 Connecticut Avenue Suite 800
Washington, D.C. 20006
202/530-5454